

COURT OF APPEALS.

TEUSANT POTHIER,

Appellant,

and

FRANÇOIS BERNIER,

Respondent.

Appellant's Case.

A. STUART, for Appellant.

COURT OF APPEALS.

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In a Cause

Between

TOUSSAINT POTHIER,

(Defendant and Incidental Plaintiff in the
Court below,)

APPELLANT,

and

FRANCOIS BERNIER,

(Plaintiff and Incidental Defendant in the
Court below,)

RESPONDENT.

APPELLANT'S CASE.

THIS was an action of general *Indebitatus assumpsit*, brought by the Respondent against the Appellant, in the Court at Three-Rivers, for the recovery of a sum alledged to be due for work and labour, in erecting divers buildings for the Appellant.

The Respondent filed two detailed accounts of work and labour so done, amounting together to three hundred and fifty-seven pounds, twelve shillings and eight pence, and also the special agreement under which the work was done.

The Appellant pleaded first the general Issue, and secondly an incidental demand.

In this last pleading the Appellant states, that the Respondent had entered into a written contract with the Appellant, for the building of a dwelling house and out houses, for the price of £185 : 0 : 0, the said house to be delivered on the 20th day of October then next, and the out-houses on the first of August, also then next.

That the Appellant had advanced to the said Respondent on account of the said price, the sum of £120 : 0 : 0. That the said Respondent had not fulfilled his engagement to the damage of the said Appellant of three hundred pounds, for which sum he prayed Judgment.

With this pleading the Appellant filed a duplicate of the special agreement, which had been entered into between these parties, and several receipts.

The Respondent by his plea, or answer to the Incidental demand, admits the special agreement but avers, that he had done all which he was bound to do, under that agreement, and that the delay which took place in the completing and delivering of the building arose from the omission of the Appellant to point out the site of the house, &c.

The cause was fixed for evidence, as well on the principal as on the Incidental demand.

It appears that the buildings were commenced only in September 18 and the Respondent ceased to work upon them in the month of February following. That one hundred and twenty pounds were received by the Respondent, in part payment of the sum of one hundred and eighty-five pounds, mentioned in the Appellant's Plea.

The Court having heard the parties, ordered a reference to *experts*.

They reported that the out-houses were delivered to the Appellant in September, 1816, that the Appellant's agent received possession of the house

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only in the month of December following, and then in an unfinished state, that to complete the house according to the terms of the agreement between the parties much work, which they specify in the report, remained to be performed.

On the 19th January 1818, the Court ordered the *experts* to appear before the Court, on the 23d of the same month for the purpose of explaining their report.

By their supplementary, or explanatory Report of the 23d January, 1818, they report, that the Appellant is entitled to no damages for the omission of the Respondent to deliver the house and out-houses, at the times specified in the agreement.

That the Respondent had not fulfilled his agreement in respect of the house, and that of the work covenanted to be done by the Respondent there remained undone, work of the value of ten pounds twelve shillings and six pence, which sum they take upon themselves to say ought to be deducted out of the balance remaining due to the Respondent by the Appellant.

The Court below having heard the parties upon these several reports and upon the evidence in the cause, pronounced on the 16th March, 1818, the following Judgment :

La Cour après avoir entendu les parties par leurs Avocats, tant sur la demande principale que sur la demande incidente : vu les rapports des experts nommés en cette cause dressés en exécution du Jugement interlocutoire de cette Cour, du trente Septembre dernier, lesquels la dite Cour a par ces présentes homologué, examiné le procédure et en avoir délibéré, faisant droit sur la demande principale, condamne le dit défendeur principal a payer au demandeur principal, la somme de quatre-vingt une livres, dix-sept chelins et six deniers courant, pour ballance due au dit demandeur principal par le dit défendeur principal pour les ouvrages de menuiserie et de charpente, mentionnés en la déclaration du dit demandeur principal suivant les conventions entre les dites parties mentionnées au dit Jugement interlocutoire du 30 Septembre dernier (déduction étant faite de la somme de quatre-vingt douze livres dix chelins, payé par le dit défendeur principal au dit demandeur principal, et aussi la somme de dix livres, douze chelins et six deniers pour les ouvrages qui restent a faire, ainsi que mentionnés au dit rapport d'experts,) avec intérêts sur la dite somme de quatre-vingt une livres, dix-sept chelins et six deniers depuis le 11 Mars, 1817 jour de la demande en Justice, jusqu'au parfait paiement et aux dépens et faisant droit sur la demande incidente, la Cour déboute la dite demande incidente avec dépens.

It is from this Judgment that the present appeal is brought.

The Reasons of Appeal are as follows :

FIRSTLY—That the said Court below, by the said final Judgment, confirmeth and homologateth the reports of the *experts* in the said cause filed, and because the said Court ought to have set aside the said Reports with costs.

SECONDLY—That the said Court below, in and by the said Judgment, maintaineth the action of him the said Respondent, against the said Appellant and condemneth the said Appellant to pay to the said Respondent a large sum of money, whereas the said Court below ought to have dismissed the said action with costs.

THIRDLY—That the said Judgment of the Court below purports to be founded upon a certain agreement, made and entered into between the said

parties, which said agreement is not mentioned in the said Respondent's declaration in the said cause filed, and hath no relation to the demand in the said declaration contained.

FOURTHLY—That although by the said agreement the said Respondent bound himself to do and perform certain work and labor, for him the said Appellant in consideration whereof the said Appellant promised to pay unto him the said Respondent a certain sum of money, when the said work and labour was by him the said Respondent done and performed, and although the said Respondent hath not yet done and performed the said work and labour, and the said agreement remains open and unfulfilled, yet the Court below by their said Judgment hath awarded unto the said Respondent a large sum of money for the said work and labor.

FIFTHLY—That the action and demand against the said Respondent were premature and unfounded and ought to have been dismissed with costs.

SIXTHLY—That the said Court below in and by the said Judgment hath dismissed the Incidental demand of the said Appellant with costs, and because the said Court below ought to have maintained the Incidental demand of him the said Appellant, and to have awarded unto him the conclusions by him in that behalf taken.

SEVENTHLY—Because the said Judgment of the Court below is repugnant, incongruous and contrary to law and evidence.

Quebec, 21st July, 1818.